
U.S. Department of Labor

Office of Administrative Law Judges
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Date: August 16, 1999

Case No. 1998-ERA-19

File No. 6-0030-98-803

IN THE MATTER OF:

Joe Gutierrez,
Complainant

v.

**Regents of the
University of California**
Respondent

RECOMMENDED DECISION AND ORDER APPROVING ATTORNEY FEES

A Recommended Decision and Order was issued in this case on June 9, 1999. On July 19, 1999, counsel for the Complainant, Carol Oppenheimer, Esquire, submitted an Application for Costs and Expenses Including Attorney Fees in the amount of \$58,694.51. This amount represents 279.1 hours of work by Attorney Oppenheimer at \$185.00 per hour, 2.5 hours of work by Attorney Morton Simon at \$185.00 per hour, 3.2 hours of work by Attorney Matthew Ortiz at \$125.00 per hour, 3.7 hours of work by Paralegal Lynne Stroud at \$50.00 per hour, \$2,528.42 in expenses, and \$3,485.09 in gross receipt taxes. On July 20, 1999, Complainant's counsel filed a supplemental affidavit setting forth additional expenses incurred in the amount of ,948.17, which had not been billed at the time of the initial application. This amount represents 4.5 hours of work by Attorney Oppenheimer at \$185.00 per hour, 20 hours of work by Paralegal Jo Parish at \$50.00 per hour, and \$115.67 in gross receipt taxes.

On August 2, 1999, the Respondent submitted objections to the fee petition. On August 12, 1999, counsel for Complainant filed a reply to Respondent's objections. I shall discuss each of the Respondent's objections in turn.

A prevailing party is entitled to an award of reasonable attorney's fees and costs incurred by the complainant in bringing the complaint. 42 U.S.C. §5851(b)(2)(B). The lodestar method is employed in calculating attorney's fees under the environmental whistleblower statutes. This method requires multiplying the number of hours reasonably expended in pursuing the litigation by a reasonable hourly rate. **Hensley v. Eckerhart**, 461 U.S. 424 (1983).

The Respondent argues that Complainant's counsel is not entitled to bill at the rates charged in the application for attorneys' fees because those rates were calculated to produce a windfall relative to the rates charged for similar services. The Respondent submitted itemized statements of professional services which were prepared by Complainant's counsel in connection with the representation of Loyda Martinez and Charles Montana.¹ The itemized statements contain the following information:

WHISTLEBLOWING
ATTY RATE \$95/HR
PARALEGAL RATE \$48/HR

The Respondent argues that by doubling her fees without justification above those she routinely charges for similar matters, counsel seeks to receive a windfall, and therefore, the hourly rate claimed in this case should be reduced to the same amount counsel routinely charges in whistleblower cases.

I find that an hourly rate of \$95.00 per hour is not a reasonable rate at which to compensate Complainant's counsel for her services in this proceeding, especially after considering the dates of service herein. Although the Respondent has produced itemized statements which indicate that Complainant's counsel charged \$95.00 per hour in connection with the representation of Charles Montano and Loyda Martinez, I do not find such itemized statements to be conclusive. Complainant's counsel explained that Charles Montano and Loyda Martinez agreed to a reduced rate at \$95.00 per hour, with the understanding that they would be responsible for legal fees at the rate of \$175.00 per hour if a settlement was reached. Counsel further explained that she did not represent Charles Montano or Loyda Martinez as their counsel of record, but merely consulted with them and provided legal and procedural advice during the Department of Energy investigation.

Given counsel's explanation for the \$95.00 per hour rate on the itemized statements, I do not find that the listing of the attorney rate on the itemized statements to be dispositive.² A fee of \$95.00 per hour for Complainant's counsel would not be reasonable, especially given the fact that counsel most professionally presented Complainant's claim, she provided excellent services, and she achieved significant success on the merits of the claim. However, I find that the rate of \$185.00 per hour to be excessive at this time. Given the nature of the litigation and the services provided I find that a reasonable hourly rate for Attorney Carol Oppenheimer and Attorney Morton

Simon is \$175.00 per hour.³ I leave the hourly rate of Matthew Ortiz unchanged at \$125.00 per hour, and the hourly rates of Lynne Stroud and Jo Parish unchanged at \$50.00 per hour.

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The Respondent next argues that Complainant's counsel is not entitled to claimed costs and expenses because she did not describe or document those costs and expenses with sufficient specificity to allow for a determination of whether they were reasonably incurred in bringing the complaint.⁴

The Administrative Review Board requires that a petition for attorney's fees include the date on which the attorney's time was expended, the amount of hours expended, and a specific description of the tasks undertaken by the attorney during that time. **Pillow v. Bechtel Construction, Inc.**, 87-ERA-35 (ARB 09/11/97). I find that Complainant's counsel has sufficiently described the claimed services. Counsel's application included the date of service, the number of hours expended, identified who performed the services and described the service provided. I find the level of detail in the descriptions of the services provided to be adequate, especially in light of this Administrative Law Judge's familiarity with the facts and issues involved in the underlying claim. To require a greater degree of specificity would impose an unnecessary and onerous burden, beyond the scope needed by this Administrative Law Judge to reach a determination.

The Respondent argues that counsel's request for reimbursement for photocopying, telefaxes, postage and telephone calls should be disallowed because those charges are not supported by documentation evidencing that they were incurred in prosecuting Complainant's case.

Certain supplemental secretarial costs, necessary travel expenses, and copying and telephone costs are reimbursable as part of any attorney fee because they are "integrally related to the work of an attorney" and may significantly contribute to the success of the litigation. **Wheeler v. Durham City Bd. of Ed.**, 585 F.2d 618, 623-624 (4th Cir. 1978); see also **Larry v. The Detroit Edison Co.**, 86-ERA-32 (Sec'y 05/19/92), **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91). I find that the costs and expenses claimed by Complainant's counsel are proper and reimbursable. An attorney seeking reimbursement of costs after a successful prosecution is not required to submit receipts or canceled checks with the attorney fee application. Counsel's costs and expenses were set forth in the submitted time records, and counsel attested that such costs and expenses were reasonably spent in the prosecution of the underlying claim. I find that the costs and expenses claimed are reasonable and fully supported, and counsel is entitled to reimbursement.

Finally, the Respondent argues that Complainant's claims for expenses should be disallowed where they have been billed more than once or where Complainant incurred no expense in relation to the described activity. The Respondent points out that 48.7

hours of attorney time for services performed between January 3, 1999, and January 9, 1999, are billed twice, and that the duplicate billing was included in the total number of hours claimed. Complainant's counsel, in her filing of August 12, 1999, noted that 48.7 hours of time were mistakenly double-billed for the period of January 3, 1999, through January 9, 1999. As counsel's application clearly shows that the 48.7 hours of services performed between January 3, 1999, and January 9, 1999, were billed twice, I hereby deduct 48.7 hours from the total number of hours claimed by Attorney Oppenheimer.

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The Respondent notes that Complainant claims he is entitled to \$151.81 for four hours of vacation time he used to attend the deposition of Dennis Derkacs.⁵ According to the Respondent, Complainant did not use any vacation time to attend the deposition of Dennis Derkacs, which took place on February 8, 1999. The Respondent submitted the affidavit of Linda Zwick, an Administrative Team Leader in the Office of Laboratory Counsel, Litigation and Employment Law Section, Los Alamos National Laboratory. Ms. Zwick explained that LANL maintains an electronic database known as "Data Warehouse" which contains financial, facility and personnel data. She further explained that the Data Warehouse information system indicated that there was no vacation time reported for Complainant on February 8, 1999, and that Complainant was paid for eight hours which were billed as "hours worked" to two different cost account codes.⁶ Complainant's counsel, in her filing of August 12, 1999, withdrew the request for reimbursement of time spent attending the deposition of Dennis Derkacs, as Complainant reviewed his records and determined no vacation time was used.

As the printout from the Data Warehouse information system shows that Complainant received "REGULAR" time on February 8, 1999, and as Complainant has withdrawn the request for reimbursement, the request for \$154.81 will not be awarded.

To summarize, 48.7 hours have been deducted from time claimed by Carol Oppenheimer, \$154.81 has been deducted from the costs and expenses, and the hourly rates of Carol Oppenheimer and Morton Simon have been reduced to \$175.00 per hour.

In light of the nature and extent of the excellent legal services rendered to Complainant by his attorneys, the benefits obtained for Complainant and the Respondents' comments on the requested fee, I find a legal fee of \$49,104.37 (including expenses), to be fair, reasonable and in accordance with the criteria provided in the regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondent, the Regents of the University of California, shall pay to Complainant, Joe Gutierrez,

- 1) attorneys fees in the amount of \$43,130.00;
- 2) costs and expenses in the amount of \$2,373.61;
- 3) gross receipt taxes in the amount of \$3,600.76, for a sum total of \$49,104.37.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:jgg

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NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

¹The Respondent explained that Complainant's counsel represented Charles Montano and Loyda Martinez, both of whom are University employees at LANL, in connection with claims of retaliation for protected activity pursuant to Department of Energy Employee Protection regulations, codified at 10 C.F.R. 708.

²I note that the Respondent states that Complainant's counsel represented Charles Montano and Loyda Martinez through May of 1999. However, the itemized statements for professional services indicate no new services billed after September 30, 1997, and October 31, 1997, respectively.

³I note that \$175.00 per hour is the rate that counsel charged Complainant in her fee agreement.

⁴The Respondent submitted a matrix, identified as Exhibit B, setting forth Respondent's specific objections to the claimed services. The Respondent's objections are based on the following grounds: vagueness, inadequate description, no connection to case, no supporting documentation, no known involvement in case, no effect on outcome of litigation, no known relevance, and excessive.

⁵Complainant actually requested \$154.81, based on an hourly rate of \$38.703 per hour.

⁶The Respondent submitted a printout from the Data Warehouse information system which showed that Complainant received "REGULAR" time on February 8, 1999.